Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	
	)	
Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-258
	)	
	)	
Indecent Programming and Other Types of Materials on Cable Access Channels	)	

REPLY OF THE NYNEX TELEPHONE COMPANIES TO COMMENTS OPPOSING THEIR PETITION FOR RECONSIDERATION

New England Telephone and Telegraph and New York Telephone Company (the "NYNEX Telephone Companies" or "NTCs") filed their Petition for Reconsideration in pursuit of one purpose, that the Commission adhere to the goals of competition and protection set forth by Congress in the 1992 Cable Act.[1] To this end the NYNEX Telephone Companies have urged the Commission to adopt carefully tailored rules to assure that cable operators do not use the discretion granted them under Section 10(a) as a means to unreasonably deny access to leased channels to competitors in the guise of prohibiting indecent programming, and to assure that aggrieved customers have meaningful relief in the form of recourse to the Commission

1 Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") Pub. L. No. 102-385.

through expedited procedures established elsewhere in this rulemaking.

I. DISCUSSION

Only two parties have opposed the NYNEX Telephone Companies' Petition, Time Warner Entertainment Company, L.P. ("Time Warner") and the National Cable Television Association ("NCTA"). Each party claims that the NTCs seek to unjustifiably limit cable operators' discretion in dealing with indecent programming on leased access channels. Such is not the case. The NTCs are simply asking the Commission to adopt measures which will assure that the discretion granted to the cable operators is not abused.[2]

Time Warner and NCTA each allege that the type of abuse that motivated the NTCs to file their Petition cannot occur. This is based on the strained argument that a cable

---

[2] Time Warner (at 1) and NCTA (at 1) question the NTCs' interest in this proceeding. The cable and telecommunications industries are converging. It is certainly possible that the NTCs will be leasees of channel capacity in the future. The NTCs filed extensive comments and reply comments in the related Cable Rate Regulation Docket (MM 92-266). As set forth in those comments, the NTCs are concerned that the Cable companies are moving aggressively into the telecommunication market without constraints, and indications are that they may use their monopoly rents from cable television to subsidize the telephone ventures. NYNEX Comments at 3. By their comments the NTCs have consistently argued that reasonable and nondiscriminatory access to leased access channels is essential to creating a competitive market. Indeed by their Reply Comments, the NTCs raised their concerns that the wide discretion being granted in this proceeding could lead to the unreasonable denial of leased access channel capacity. Thus the NTCs have a clear and established interest in this proceeding.

operator cannot favor an affiliated programmer over a nonaffiliated programmer because an affiliated programmer is not considered a leased access channel customer. "Therefore, on leased access channels there can be no discrimination between affiliated programmers and other programmers."[3]

This argument merely serves to highlight the NTCs' concerns. The type of discrimination to which the NTCs refer would take place across channel capacity, and is not limited to a cable operator's activities on leased access channels. A cable operator may, for example, decide to allow an affiliated programmer to run a particular program or class of programs over its own channels, while denying an unaffiliated programmer the ability to run the same or similar programs over a leased access channel. If cable operators indeed read the Act as isolating the potential for arbitrary discrimination to leased

> successful in gaining access through Section 612 ....
>
> The cable operator is almost certain to have interests that clash with that of the programmer seeking to use leased access channels. If their interests were similar, the operator would have been more than willing to carry the programmer on regular cable channels. The operator thus has already decided for any number of reasons not to carry the programmer.[4]

This excerpt from the Senate Report also refutes the claim that the NTCs raised only a spectre of harm,[5] or that its concerns lack a factual basis.[6]

Both Time Warner[7] and NCTA[8] argue that Section 10(a) restores editorial discretion otherwise restricted by Section 612(c)(2) of the 1984 Cable Act, and that as such the cable operator's discretion regarding indecent programming should be given broad berth. However, because it is the exception to the general rule, the Commission should place at least some parameters around this discretion.

The opposing parties state that the NTCs' request that the FCC reconsider its rule to make certain that the cable operator may not discriminate among providers of like programming will be difficult to administer and should, therefore, be rejected by the Commission. Inconvenience should

---

4 Senate Report 102-92 at p. 30.

5 NCTA at 2.

6 Time Warner at 2.

7 Time Warner at 2.

8 NCTA at 4.

not in itself excuse the cable operators -- or the Commission -- from adopting measures to limit arbitrary discrimination that would impede the fundamental purpose of the Act, that is to promote competition. The Commission has required common carriers to administer equally unwieldy standards under even more difficult circumstances.[9]

Administrative safeguards that allow the cable operators editorial discretion while protecting the leased access programmer can, and should be crafted. For example, similar to the proposal offered by Denver Access[10] in their comments in this proceeding, the cable operator could be required to give advance written notice of its determination, stating with precision what provision of the standard set forth in Section 10(a) led to the conclusion that the program was indecent. Such a procedure would not, in any way, limit the cable operator's discretion, only make the operator accountable

[redacted]

II. CONCLUSION

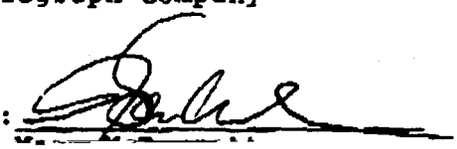
For the reasons set forth herein, the NYNEX Telephone Companies again respectfully ask the Commission to reconsider its First Report and Order, and to conform it with the sections of the Cable Act mandating reasonable and nondiscriminatory access to leased channels and expedited procedures for resolving disputes.

Respectfully submitted,

New York Telephone Company

and

New England Telephone and Telegraph Company

By: 

CERTIFICATE OF SERVICE

I certify that copies of the foregoing REPLY OF THE NYNEX TELEPHONE COMPANIES TO COMMENTS OPPOSING THEIR PETITION FOR RECONSIDERATION were served on each of the persons listed on the attached Service List for MM Docket No. 92-258, this 6th day of May, 1993, by first class United States mail, postage prepaid.

Jamene Johnson

JAMENE JOHNSON

ALLEN PUBLIC LIBRARY
Steven C. Fortriede
900 Webster Street
Fort Wayne, Indiana 46802

ARIZONA CABLE TELEVISION ASSOCIATION
3610 North 44th Street, #240
Phoenix, Arizona 85018

ALLIANCE FOR COMMUNITY MEDIA AND THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY
James N. Horwood
Spiegel & McDiarmid
1350 New York Ave,. NW
Washington, DC 20005

Norman M. Sinel
Stephanie M. Phillipps
William E. Cook, Jr.
ARNOLD & PORTER
1200 New Hampshire Avenue, NW
Washington, DC 20036

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Majorie Heins
Arts Censorship Project
132 West 43rd Street
New York, NY 10036

BLADE COMMUNICATIONS, INC.
MULTIVISION CABLE TV CORP.
PARCABLE, INC.
PROVIDENCE JOURNAL COMPANY
SAMMONS COMMUNICATIONS, INC.
Donna C. Gregg
Michael K. Baker
WILEY, REIN & FIELDING
1776 K Street, NW
Washington, DC 20006

PEOPLE FOR THE AMERICAN WAY
Elliot Mincberg
Sonia Bacchus
Andrew Jay Schwartzman

Virginia B. Bogue
2625 Jetton Avenue
Tampa, Florida 33629

CABLE TV REGULATORY BOARD
Mark Conrad Baratta
9 Main Street
Freeport, Maine 04032

CITY OF ST. PAUL
Joseph VAn Eaton
Lisa S. Gelb
MILLER & HOLBROOKE
1225 Ninteenth Street, NW
Suite 400
Washington, DC 20036

CAPITAL COMMUNITY TELEVISION
Alan Bushong,
Executive Director
P.O. Box 2342
Salem, Oregon 97308

CITY OF TAMPA
OFFICE OF CABLE COMMUNICATION
306 East Jackson Street
Tampa, Florida 33602

CINCINNATI COMMUNITY VIDEO, INC.
Joyce Miller, Executive Director
3130 Wasson Road
Cincinnati, OH 45209

ROXIE LEE COLE
1145 Bishop Drive, Apt F
Dayton, Ohio 45449

CITY OF AUSTIN, TEXAS
Diana L. Granger
Edward Delabarre
P.O. Box 1088
Austin, TX 78767-8828

COLE, RAYWID & BRAVERMAN
Paul Glist
Steven J. Horvitz
Susan Whelan Westfall
1919 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006

CITY OF SAN ANTONIO
Bill R. Arnette
Management Services Department
P.O. Box 839966
San Antonio, Texas 78283-8966

COLUMBUS COMMUNITY CABLE
ACCESS, INC.
Carl Kucharski
394 Oak Street
Columbus, OH 43215

COMMUNITY ACCESS NETWORK, INC.
Richard Hayes
900 Webster Street
Fort Wayne, IN 46802

DEFIANCE COMMUNITY TELEVISION
Norman B. Compton
613 W Third Street
Defiance, OH 43512

COMMUNITY ANTENNA TELEVISION

DENVER AREA EDUCATIONAL

MANHATTAN NEIGHBORHOOD NETWORK
Alexander Quinn
110 East 23rd Street, 10th Floor
New York, NY 10010

MULTNOMAH COMMUNITY TELEVISION
Robert Brading
26000 SE Stark
Gresham, OR 97030

METROPOLITAN AREA
COMMUNICATIONS COMMISSION
Paula Manley
Community Television Manager
1815 NW 169th Place, Suite 6020
Beaverton, OR 97006

NATIONAL CABLE TELEVISION
ASSOCIATION
Daniel L. Brenner
Diane B. Burstein
1724 Massachusetts Ave, NW
Washington, DC 20036

ERIC S. MOLLBERG
Public Access Coordinator

NATIONWIDE COMMUNICATIONS INC.
Edward W. Hummers, Jr.

Wyland Dale Clift
NUTMEG PUBLIC ACCESS
TELEVISION, INC.
24 Spring Lane
Farmington, CT 06032

TIME WARNER ENTERTAINMENT
COMPANY, L.P.
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019

'ŌLELO: THE CORPORATION FOR
COMMUNITY TELEVISION
960 Mapunapuna Street, 2d Floor
Honolulu, HI 96819

TUCSON COMMUNITY CABLE CORPORATION
Sue Behrend
124 E. Broadway
Tucson, AZ 85701

Randy Visser
Director, SPTV
Fort Road
South Portland, ME 04106

VIACOM INTERNATIONAL INC.
Lawrence W. Secrest, III
Donna C. Gregg
WILEY, REIN & FIEDLING
1775 K Street, NW
Washington, DC 20006

STATEN ISLAND COMMUNITY TELEVISION
Gary P. Bartels
100 Cable Way - Suite 2
Staten Island, NY 10303

WAYCROSS COMMUNITY TELEVISION
Joseph E. Orndorff
Gregory R. Vawter
2086 Waycross Road
Forest Park, Ohio 45240-2717

TELE-COMMUNICATIONS INC.
WILKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036-3384

Joseph W. Waz, Jr.
THE WEXLER GROUP
1317 F Street, NW
Washington, DC 20004